Federal-State Relations in Gun Control: The 1993 Brady Handgun Violence Prevention Act

Carol J. DeFrances and Steven K. Smith
Bureau of Justice Statistics, U.S. Department of Justice

The Brady Handgun Violence Prevention Act, which took effect in February 1994, sets minimum nationwide requirements for the sale of handguns and establishes a national criminal-background information system. Each of these thrusts of Brady involves fundamental issues of federalism. The first involves the traditional give-and-take between the states and the federal government in sorting out specific authority over the prohibition of firearm sales. The second thrust, establishing a national information network, requires cooperation of all the states and the federal government. This article reviews Brady in the context of twenty-five years of federal gun-control activity, examines its impact on federal-state relations, and addresses the development of a national criminal-history information network linking the states and the federal government.

One policy area in which the states have been in the forefront is crime control. Given that the U.S. Constitution does not specifically identify police power as a national government function, federal crime-control policies have traditionally been limited in scope. The majority of criminal justice activity in the U.S. federal arrangement takes place in the state and local arenas. State and local governments accounted for about 90 percent of the almost $75 billion spent on all justice activities throughout the nation in 1990. Federal expenditures accounted for the remaining 10 percent.[1] Violent crime is especially the focus of state and local criminal justice systems. In 1990, state courts convicted almost 150,000 defendants of violent felonies.[2] By contrast, U.S. district courts convicted less than 2,500 violent felony defendants.[3]

AUTHORS' NOTE: The views expressed herein are those of the authors and not necessarily those of the U.S. Department of Justice. The authors wish to thank Carol Kaplan and Tom Hester of the Bureau of Justice Statistics for their assistance.

[1]Sue A. Lindgren, *Justice Expenditure and Employment, 1990* (Washington, D.C.: Bureau of Justice Statistics, September 1992), Table 2. See also, U.S. Advisory Commission on Intergovernmental Relations, *The Role of General Government Elected Officials in Criminal Justice* (Washington, D.C.: ACIR, 1993).

[2]Patrick A. Langan and John M. Dawson, *Felony Sentences in State Courts, 1990* (Washington, D.C.: Bureau of Justice Statistics, March 1993), Table 1.

[3]Bureau of Justice Statistics, *Federal Criminal Case Processing, 1982-1991* (Washington, D.C.: BJS, November 1993), Table 9.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

Because the operational crime-fighting capacity of the federal government has been historically narrow compared to that of state and local governments, the federal government has instead supported state and local efforts through national leadership, financial and technical assistance, research, and information. The federal government has also used its regulatory authority over interstate affairs to prohibit activities on a nationwide basis that are regarded as contributing to criminal activity.

The Brady Handgun Violence Prevention Act of 1993 (Brady) is an example of the federal government using both its authority over the interstate commerce of firearms to regulate firearms sales and its capacity to provide financial and technical assistance to the states to establish a national instant background-check system that dealers will be required to use prior to firearms sales. The national information system, as provided for in Brady, charts a new high-technology direction for federalism. Successful implementation of this criminal justice data system requires the sharing of technology and information between the states and the federal government. This article reviews Brady within the history of federal gun-control activity, examines its impact on federal and state relations, and addresses the development of a national criminal history information network linking the states and the federal government.

FEDERAL GUN-CONTROL INITIATIVES, 1968-1993

In 1968, the Congress passed two gun-control measures as part of the federal response to the assassinations of Robert F. Kennedy and Martin Luther King, Jr. The first federal reaction to handgun violence began with Title IV (State Firearms Control Assistance) of the historic 1968 Omnibus Crime Control and Safe Streets Act, signed by President Lyndon B. Johnson in June 1968. Title IV defined federal control over the interstate commerce of handguns, making it unlawful for a licensed importer, manufacturer, or dealer to sell any firearm to a fugitive from justice, an individual under indictment, or a person convicted of a felony.[4]

Title IV was closely followed in October by the Gun Control Act of 1968, which, as amended, is the basis for the current federal regulation of firearms sales, overseen by the federal Bureau of Alcohol, Tobacco and Firearms (BATF).[5] The 1968 Gun Control Act expanded federal regulations set forth in Title IV of the 1968 Omnibus Crime Control and Safe Streets Act to long guns, such as rifles and shotguns. The 1968 act, as amended, also expanded the categories of individuals prohibited from purchasing a firearm. These classifications of federally prohibited individuals are identified in Brady as well. For example, under Brady, any person attempting to purchase a handgun must indicate that he/she:

[4]1968 Omnibus Crime Control and Safe Streets Act, P.L. 90-135, Title IV, Subsection 992.

[5]Bureau of Justice Statistics, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms: Task Force on Felon Identification in Firearm Sales* (Washington, D.C.: BJS, October 1989), p. 80.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

- is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;
- is not a fugitive from justice;
- is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act);
- has not been adjudicated as a mental defective or been committed to a mental institution;
- is not an alien who is illegally or unlawfully in the United States;
- has not been discharged from the Armed Forces under dishonorable conditions; and
- is not a person who, having been a citizen of the United States, renounced such citizenship.[6]

Brady represents the first major federal legislation on gun control since the 1968 Gun Control Act.[7] Brady, which amends that act, sets national minimum requirements for firearms purchases. Brady first establishes an interim system, to remain in effect for up to five years. The system requires a waiting period of up to five days during which a criminal record check of the gun purchaser is to be conducted by local law enforcement. Under the permanent provisions, instant checks will be made against a national criminal background-check system to allow gun dealers to directly identify potential buyers who are prohibited by law from purchasing a firearm. Prior to Brady, the only federal pre-sale requirement was that a potential purchaser provide the dealer with a self-reported BATF firearms transaction record form.

As of 1991, the federal government, forty-three states, the District of Columbia, and the Virgin Islands had provisions in their penal codes making it a criminal offense, usually a felony, for a person previously convicted of a felony to own, possess, or carry a firearm.[8] While the main focus of Brady is to prevent felons from obtaining firearms, federal law also prohibits other defined populations, such as drug addicts and mental defectives, from purchasing firearms. The availability of accurate records to identify these populations presents a challenge to a nationwide information system, given that security and privacy issues need to be considered.[9]

[6]Brady Handgun Violence Prevention Act (Brady Act), P.L. 103-159, 30 November 1993, Title I, Section 102. Certain exceptions are allowed under federal law (e.g., if an individual's rights have been restored).

[7]Before 1968, the Federal Firearms Act of 1938 first required licenses for manufacturers, dealers, and importers. See *1968 Congressional Quarterly Almanac*, vol. 24 (Washington, D.C.: CQ Press, 1968), pp. 549-566, for a discussion of the legislation.

[8]Bureau of Justice Statistics, *Statutes Requiring the Use of Criminal History Record Information* (Washington, D.C.: BJS, June 1991), p. 63.

[9]Bureau of Justice Statistics, *Identifying Persons, Other than Felons, Ineligible to Purchase Firearms: A Feasibility Study* (Washington, D.C.: BJS, May 1990), p. 17.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

Even when appropriate records exist, legal requirements may prohibit access. For example, federal regulation prohibits drug-treatment programs that receive federal funds from disclosing patient records.[10] Additionally, many states have laws requiring confidentiality of drug-treatment records.[11]

IMPLEMENTATION OF THE BRADY ACT

Each year, law enforcement officials report that nearly 600,000 firearm crimes come to their attention.[12] In 1992, the handgun victimization rate was the highest ever recorded. Offenders armed with handguns committed a record 931,000 violent crimes.[13] Overall, handgun crimes accounted for about 13 percent of violent crime in 1992.[14] From a traditional policy perspective, Brady is a regulatory policy designed to protect the public by strengthening existing statutes that prohibit the sale of firearms to certain groups as a means of controlling firearm crimes.[15]

Brady addresses public-safety concerns by requiring a criminal background check to determine if a prospective firearm purchaser is in a prohibited category. In order to conduct the national criminal background checks effectively, accurate and complete criminal history records must be maintained by the states and made available on an interstate basis. Ultimately, the goal of Brady is to improve state records so as to render an interstate system operational before the five-day waiting period sunsets. The federal government will provide the overall communications linkage for the instant check system, with the states providing the criminal history records.

Brady focuses on two aspects of firearms sales: the actual transaction of a firearms purchase, and the establishment of a national instant background-check system to facilitate point-of-sale systems, whereby a purchase and record check can take place immediately. As a consequence, the implementation of Brady directly impacts two groups: (1) federal gun licensees (dealers) who sell handguns,[16] and (2) federal, state, and local law-enforcement agencies.

Impact on Dealers

In order for a federal firearms licensee to transfer a handgun to an individual (other than a dealer), the dealer must:

[10]Ibid., p. 37.

[11]Ibid., p. 39.

[12]Bureau of Justice Statistics, *Firearms and Crimes of Violence: Selected Findings from National Statistical Series* (Washington, D.C.: BJS, February 1994), p. 3.

[13]Michael R. Rand, *Crime Data Brief: Guns and Crime* (Washington, D.C.: Bureau of Justice Statistics, April 1994).

[14]Ibid.

[15]See Randall B. Ripley and Grace A. Franklin, *Policy Implementation and Bureaucracy* (2nd ed.; Chicago, Ill.: Dorsey, 1986), pp. 61-91.

[16]About 280,000 gun dealers throughout the country hold a federal license to sell firearms. However, many of these dealers account for only a small fraction of firearms sold each year. The president's 1995 budget recommends increasing the federal license fee from $66 to $600 in order to eliminate approximately 200,000 dealers. See Executive Office of the President, Office of Management and Budget, "Personal Security: Crime, Illegal Immigration, and Drug Control," *Budget of the United States Government, Fiscal Year 1995* (Washington, D.C.: U.S. Government Printing Office, 1994), p. 201.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

- obtain a statement from the purchaser (Brady form) containing the purchaser's name, address, and date of birth appearing on a valid photo identification, and a statement that the purchaser is not a felon, under indictment, or otherwise prohibited from receiving or possessing the firearm under the law;
- verify the identity of the purchaser by examining the identification document presented;
- within 1 day after the purchaser furnishes the statement, contact (by telephone or otherwise) the chief law enforcement officer (CLEO) of the place of residence of the purchaser and advise such officer of the contents of the statement;
- within 1 day after the purchaser furnishes the statement, provide to the CLEO of the place of residence of the purchaser and a copy of the statement; and
- wait up to 5 business days from the date of furnishing notice of the contents of the statement to the CLEO unless the dealer receives earlier notice from the CLEO of the place of residence of the purchaser that possession of the handgun by the purchaser does not violate the law.[17]

Impact on Law Enforcement

Local law enforcement officials also face new procedures. When notified by a gun dealer of a potential buyer's intent to purchase, Brady stipulates that local law-enforcement officials shall "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[18] If the gun dealer does not hear from the CLEO within five business days, the dealer can complete the sale. Additionally, within twenty days after receiving the Brady form, the CLEO must destroy records related to the inquiry, except those that involved prohibited buyers.[19] By mandating that the CLEO destroy records except those applicable to prohibited buyers, the Congress made provisions to balance the concerns over recordkeeping and the right to privacy for gun owners.

As has been the case in selected areas of public policy, regulatory actions in some states have preceded those of the federal government. Many states already meet or exceed Brady requirements of providing the criminal background check and five-day waiting period. BATF preliminarily classified all of the states to

[17]Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, "Brady Handgun Violence Protection Act, Questions and Answers," 21 January 1994. Distributed at the National Conference on Criminal History Records: Brady and Beyond, Washington, D.C., 8-9 February 1994.

[18]Brady Act, Title I, Section 102.

[19]Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, "Brady Handgun Violence Protection Act, Questions and Answers."

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

determine which have laws that would qualify as acceptable alternatives to the federal five-day waiting requirement. Table 1 shows that over one-third of the states already had implemented record checks and/or waiting periods before Brady became law.

TABLE 1
States Subject to the Federal Five-Day Waiting Period or States Having Alternatives as Defined in the Brady Law

States that must comply with the federal 5-day waiting period

Alaska	Maine	Oklahoma
Arizona	Minnesota	Rhode Island
Arkansas	Montana	Texas
Colorado	Nevada	Utah
Idaho	New Hampshire	Vermont
Kansas	New Mexico	Washington
Kentucky	North Dakota	West Virginia
Louisiana	Ohio	Wyoming

States that meet one of the alternatives to the federal 5-day waiting period

States that require a permit or other approval-type system

California	Maryland	Nebraska
Connecticut	Massachusetts	New Jersey
Hawaii	Michigan	New York
Indiana	Missouri	Oregon
Iowa		

States that require an instant check system

Delaware	Virginia
Florida	Wisconsin

States that require a permit and instant check system

Illinois

States that may not fall fully within either category

Alabama	Pennsylvania
Georgia	South Carolina
Mississippi	South Dakota
North Carolina	Tennessee

SOURCE: Preliminary list prepared by the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 19 January 1994. Distributed at the National Conference on Criminal History Records: Brady and Beyond, Washington, D.C., 8-9 February 1994.

Preliminary Findings

Preliminary statistics released by BATF for fifteen cities and states during the first month of operation of Brady showed that at least 1,605 people were prevented from buying a handgun, including fugitives and felons convicted of armed robbery, murder, and manslaughter.[20] Moreover, the responsiveness of the law-enforcement

[20]Pierre Thomas, "Brady Law Appears to Cast Effective Net," *The Washington Post*, 31 March 1994, p. A1.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

community is reflected in the increased number of queries to the Interstate Identification Index (III), the Federal Bureau of Investigation's (FBI) national master name-index database. According to BATF, FBI background checks jumped from between 2,000 to 3,000 per day before Brady to 15,000 to 17,000 per day after Brady became effective on 28 February 1994.[21]

FEDERAL AND STATE ROLES

Each of the two thrusts of Brady, the regulation of firearm transactions and the establishment of the national check system, involves fundamental issues of federalism. The first aspect involves the traditional give-and-take between the states and the federal government in sorting out specific authority over domestic policies, such as the prohibition of firearm sales. The second action, establishing a national information network, requires cooperation of all the states and the federal government.

State Reaction to Brady

Under Brady, state and local governments are responsible for implementing key provisions.[22] However, by the time Brady passed in 1993, eighteen states already were conducting criminal background checks prior to firearms sales or to granting a firearm purchase permit.[23] Recognizing that some states already had established systems in place, Brady specifies that states with existing pre-sale background checks do not have to follow the interim provisions. Federal statute does not supersede state requirements for longer waiting periods or more extensive background checks, such as those requiring fingerprint checks, than provided for by Brady.

Additionally, several provisions of earlier versions of Brady were dropped from the final law. One such provision would have penalized states by withholding a percentage of their Department of Justice drug law enforcement grants if they failed to meet assigned timetables for implementation. Brady also exempts selected rural areas from the waiting-period requirement. Brady acknowledges that compliance with the five-day waiting period may be impractical in some isolated areas because:

- the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of the land area of the State does not exceed 0.0025;
- the business premises of the [licensed firearm dealer] at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

[21]"Brady Bill Is Working, Federal Officials Say," *Criminal Justice Newsletter*, vol. 25, 4 April 1994, pp. 1-2.

[22]See Andre Henderson, "Gun Control's Costly Ammunition," *Governing* 7 (May 1994): 23-24, for a discussion of state issues.

[23]Based on a preliminary list prepared by the Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, 19 January 1994. Distributed at the National Conference on Criminal History Records: Brady and Beyond, Washington, D.C., 8-9 February 1994.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

- there is an absence of telecommunication facilities in the geographical area in which the business premises are located.[24]

Legal and Constitutional Issues

The implementation of Brady has raised some constitutional challenges. As of this writing, several state and local officials[25] initiated lawsuits challenging Brady, contending that the act violates the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not delegated to the federal government. In particular, local officials have challenged the Brady provision that addresses local law enforcement conducting background checks for purchasers.

Various federal court judges have ruled differently regarding the constitutionality of Brady. For example, in May 1994, a U.S. district court judge in Montana declared the provision in Brady requiring local law-enforcement officials to conduct a background check on anyone wanting to purchase a firearm, unconstitutional.[26] The judge ruled that Brady requires state officials to administer a federal program, violating the Tenth Amendment's limits on the federal government's power over the states.[27] Relying greatly on the U.S. Supreme Court's ruling in *New York* v. *United States* (1992),[28] the judge opined that: "By requiring the states to carry out an unfunded federal mandate, Congress . . . substantially commandeered state executive officers and indirectly commandeered the legislative processes of the states to administer a federal program."[29] Left in place, however, were provisions of the law that mandate a five-day waiting period to purchase a gun.[30] Shortly thereafter, in June 1994, a U.S. district court judge in Texas upheld Brady by rejecting a sheriff's claim that the new gun-control measure violated the constitutional protection of states' rights.[31] Also in June 1994, a federal judge in Arizona ruled that requiring local law enforcement to make background checks was unconstitutional.[32] Brady challenges are still pending in Louisiana, Mississippi, and Vermont.

The U.S. Department of Justice announced, however, that it would not prosecute law-enforcement officials who failed to conduct background checks on prospective handgun purchasers. The department cited the vagueness of the phrase "reasonable effort" in Brady as conveying Congress' intention to give law-enforcement officials as much discretion as possible.[33] Further, the legislative history of Brady indicates that the Congress did not envision criminal sanctions applying to law enforcement officials.[34]

[24]Brady Act, Title I, Section 102.
[25]"Brady Ruling Heartens Opponents of Gun Control," *The New York Times*, 24 May 1994, p. A12.
[26]"U.S. Judge Voids Part of Brady Gun Control Law," *The Washington Post*, 17 May 1994, p. A6.
[27]Ibid.
[28]112 S.Ct. 2408 (1992). See also, John Kincaid, "From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption, 1780-1992," *Journal of Law and Politics* 9 (Winter 1993): 333-430.
[29]*Printz* v. *United States*, U.S. District Court for Montana, 16 May 1994.
[30]"U.S. Judge Voids Part of Brady Gun Control Law," *The Washington Post*, 17 May 1994, p. A6.
[31]"Federal Judge in Texas Upholds Brady Gun Control Measure," *The Washington Post*, 2 June 1994, p. A13.
[32]"U.S. Judge Strikes Down Part of Gun Law," *The New York Times*, 30 June 1994, p. A17.
[33]"U.S. 'Lacks Authority' to Enforce Brady Law," *The Washington Post*, 19 March 1994, p. A3.
[34]Ibid.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

Funding for Brady

The federal grant system has been the primary tool for involving state and local governments in the implementation of domestic programs. To encourage state participation in the national instant background-check system required under Brady, the Congress authorized a $200 million grant program,[35] administered by the Bureau of Justice Statistics (BJS), to provide funding to the states for the following activities:

- to create a computerized criminal history record system or improve an existing one;
- to improve accessibility to the national instant criminal background-check system; and
- upon establishment of a national system, to assist the States in the transmittal of criminal records to the national system.[36]

To date, no federal funds have been appropriated for the program. Even if the $200 million is appropriated over the next four years, federal funds may not entirely cover the cost of helping the states completely automate and update their criminal history records.[37]

The cost of compliance with Brady varies from state to state, depending on population size and the status of their criminal history records. In some states with established systems, a fee is charged by the repository to conduct the search,[38] which is generally passed on to the gun purchaser. In an era of fiscal constraint, it is likely that more states will turn to imposing a fee on gun purchasers to fully or partially fund their criminal background-checking systems.[39]

The funds authorized under Brady are not the first federal efforts undertaken to improve criminal history records. Over the last twenty-five years, the federal government has funded a number of initiatives to establish a national records system and to improve the quality of the records nationwide. In 1969, the Law Enforcement Assistance Administration (LEAA) supported the establishment of Project SEARCH, a consortium of states to develop and demonstrate a computerized system for the interstate exchange of criminal history record information. To encourage states to develop a criminal justice information system designed to meet their own needs, in 1972, LEAA launched the Computerized Data Systems program (CDS). By 1976, twenty-six states participated in the Computerized Criminal History (CCH) component of the CDS program.[40]

[35]The president's FY 1995 budget provides $100 million for grants to the states for criminal history record improvements.

[36]Brady Act, Title I, Section 104.

[37]Henderson, "Gun Control's Costly Ammunition," 24.

[38]Bureau of Justice Statistics, *Survey of Criminal History Information Systems, 1992* (Washington, D.C.: BJS, November 1993), p. 59.

[39]Henderson, "Gun Control's Costly Ammunition," 24.

[40]Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report* (Washington, D.C.: BJS, November 1993), p. 22.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

After the demise of LEAA, the U.S. Department of Justice and other agencies provided grants to state and local agencies. The recent Criminal History Record Improvement Program (CHRI), administered by BJS, provided approximately $27 million to the states during fiscal years 1990-1993[41] for improving the quality of criminal records, flagging felony records, and increasing or developing access to the FBI's III system.[42] Additionally, BJS and FBI issued voluntary guidelines in 1991 for state reporting of criminal records.

The Congress also has recognized the importance of improving the quality and completeness of state criminal record history systems. The 1990 Crime Control Act required each state to allocate a minimum of 5 percent of its total Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant[43] for the improvement of criminal justice records. In FY 1993, over $26 million from this formula grant program was allocated for criminal justice record improvement.[44]

ESTABLISHMENT OF A NATIONAL INFORMATION NETWORK

Criminal history data are critical to the success of Brady as well as for decisionmaking throughout the federal, state, and local criminal justice systems. Research indicates that as many as two-thirds of all persons arrested for criminal offenses have prior criminal records, often including offenses in more than one state or jurisdiction.[45] Consequently, prior criminal involvement impacts the manner in which these individuals are processed through the criminal justice system.

Importance of Criminal History Information

All of the states and the federal government require designated criminal justice practitioners to consider past criminal records in carrying out their duties. For example, the federal government, the District of Columbia, and all but three states (Idaho, New Hampshire, and Oklahoma) have statutes, constitutional provisions, or court rules that require or permit the consideration of an arrested person's criminal history in deciding whether and under what conditions pretrial release can occur.[46] The increasing use of such information in identifying habitual offenders, for charge and plea negotiations, for bail and pretrial release decisions, for sentencing determinations,[47] for correctional classification and supervision decisions, and for

[41]Bureau of Justice Statistics, *Attorney General's Program for Improving the Nation's Criminal History Records: Bureau of Justice Statistics Implementation Status Report* (Washington, D.C.: BJS, February 1992).

[42]Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, pp. 69-70.

[43]The Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program, administered by the Bureau of Justice Assistance, is designed to help state and local governments implement projects to improve the functioning of the criminal justice system.

[44]Bureau of Justice Assistance, *Fiscal Year 1993 Review of State Formula Grant Strategies* (Washington, D.C.: BJA, November 1993), p. 5.

[45]Bureau of Justice Statistics, *Statutes Requiring the Use of Criminal History Record Information*, p. 1.

[46]Ibid., p. 5.

[47]In 1992, 96 percent of the nation's prosecutors reported using adult criminal history records in prosecuting felony cases. In adult cases, prosecutors most frequently used criminal history records during sentencing (92 percent) followed by pretrial negotiations (82 percent). See John M. Dawson,

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

parole eligibility determinations highlight the importance of maintaining accurate and complete criminal history records on an interstate basis.[48]

In addition, criminal history information has many uses outside the criminal justice system. Many government bodies, including the federal government, and private-sector employers utilize criminal history information for purposes of licensing determinations, pre-employment screening, and security clearances. In response to the growing demand by non-criminal users, the states have developed a wide variety of rules and regulations on the release of criminal justice data for non-criminal justice uses. While this has allowed states to develop policies that meet their own statewide needs, it has complicated the establishment of an interstate system. The maze of privacy and security laws makes it difficult to create such a nationwide system.[49] In order to facilitate the exchange of interstate criminal justice data for non-criminal justice use, the federal government and the states have prepared a draft "interstate compact." If ratified by the Congress and the states, the compact would establish policy for interstate exchange of data for non-criminal justice users.[50]

The Status of Criminal History Records

Although complete and accessible criminal history information is utilized both inside and outside the criminal justice system, it has not always been easy to obtain. In a nationwide 1992 survey of state prosecutor offices, incomplete (62 percent) and inaccurate (41 percent) records were mentioned most often by prosecutors as the main problems with criminal history records.[51] Other studies have highlighted the fact that the information maintained in state and federal repositories is not always accurate and complete.[52] These problems persist in part from the failure of criminal justice agencies to report accurate and complete information regularly and in part from inadequate equipment and procedures at repositories.[53]

Currently, FBI maintains criminal history information files for federal and state offenders that are voluntarily submitted by the states. FBI's National Crime Information Center (NCIC) "links criminal justice agencies with the Interstate Identification Index (III), a master name-index of subjects whose records are maintained in automated form by the States and/or the FBI."[54] The III system,

Steven K. Smith, and Carol J. DeFrances, *Prosecutors in State Courts, 1992* (Washington, D.C.: Bureau of Justice Statistics, December 1993), p. 4.

[48]Bureau of Justice Statistics, *Report of the National Task Force on Criminal History Record Disposition Reporting* (Washington, D.C.: BJS, June 1992), pp. 6-12; Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, pp. 14-16.

[49]Bureau of Justice Statistics, *Criminal History Record Information: Compendium of State Privacy and Security Legislation, 1992* (Washington, D.C.: BJS, July 1992), p. 11.

[50]See Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, pp. 62-63 and Appendix 21 for detailed discussion of the "Interstate and Federal-State compact to establish interstate standards for collection and release of criminal history information for non-criminal justice purposes."

[51]Dawson et al., *Prosecutors in State Courts, 1992*, p. 5.

[52]Surveys and audits have shown that a substantial percentage of arrests on file in many repositories lack disposition information, that the arrest and disposition information are not correct, and that the content and format of the information may not meet the needs of some users. See Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report.*

[53]Ibid., p. 2.

[54]Bureau of Justice Statistics, *Statutes Requiring the Use of Criminal History Record Information*, p. 67.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

which began in 1980, has been designated by the attorney general to serve as the national instant check system mandated by Brady. Accurate and complete state-maintained records are critical for an effective and timely nationwide system.

In 1992, it was estimated that 17.5 million records were held in the III system, with a little more than half of the records having disposition information.[55] As of August 1993, twenty-five state repositories had begun participating in the III system, providing access to over 21,000,000 automated records.[56] These states are responding to criminal justice requests for their III indexed records from criminal justice agencies nationwide.

Table 2 gives an overview of state criminal history files for 1992.[57] Over 47.3 million individual offenders were in the criminal history files of the state central repositories on 31 December 1992. Overall, 77 percent of the criminal history files maintained by the state repositories were automated. However, the states vary considerably. Four states (Maine, New Mexico, Vermont, and West Virginia) and the Virgin Islands have no automated criminal history files; sixteen states (Alabama, Colorado, Florida, Georgia, Hawaii, Massachusetts, Michigan, Montana, Nevada, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Washington, and Wyoming) and Puerto Rico have fully automated systems.

Several states have taken the lead in developing automated criminal history information systems and background-check procedures. In 1989, Virginia was the first state to initiate a point-of-sale firearm transaction program, which required instant criminal background checks before sale of a firearm. Under Virginia's Firearm Transaction program, licensed and registered gun dealers are required to request criminal history record checks on prospective purchasers by calling the Department of State Police. The purchaser's name and selected personal data are immediately entered into the computerized system while the dealer remains on the telephone line. An approval or disapproval decision regarding the sale of the firearm is based on the results of a criminal history background check that must be completed within one business day.[58] Florida also has a similar point-of-sale purchase program for all firearms. However, Florida law also requires a three-working-day waiting period between the purchase at retail and the delivery of the weapon. This waiting period applies only to handguns.[59] To date, Delaware,

[55]Estimates were derived from Federal Bureau of Investigation data on III system participation and a survey of state record holdings by SEARCH Group, Inc. Estimates were distributed at the National Conference on Criminal History Records: Brady and Beyond, Washington, D.C., 8-9 February 1994.

[56]Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, p. 57.

[57]All fifty states, the District of Columbia, and Puerto Rico have established central repositories to collect, maintain, and disseminate criminal history information. Many states have adopted statutes that are quite specific about the types of information to be reported, the agency or official to report the information, and the time within which the information must be reported. Other states have enacted very general reporting requirements with few details. For more information, see Bureau of Justice Statistics, *Criminal History Record Information: Compendium of State Privacy and Security Legislation, 1992* and Bureau of Justice Statistics, *Survey of Criminal History Information Systems, 1992*.

[58]Bureau of Justice Statistics, *National Conference on Improving the Quality of Criminal History Records: Proceedings of BJS/SEARCH Conference* (Washington, D.C.: BJS, January 1992), pp. 68-70.

[59]Florida Department of Law Enforcement, Firearm Purchase Program, *Dealer's Manual*, February 1993, p. 5.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

TABLE 2
Overview of State Criminal History Files, 1992

State	Total	Number of individual offenders in state criminal history file		Percent of arrests within past five years in database that have final dispositions recorded
		Automated file	Percent of automated files	
Alabama	1,300,000	1,300,000	100	40
Alaska	180,500	130,500	72	86
Arizona	631,000	342,600	54	57
Arkansas	417,600	132,600	32	—
California	4,675,400	3,657,400	79	70
Colorado	575,700	575,700	100	—
Connecticut	648,700	325,600	50	95
Delaware	237,300	158,000	67	62
District of Columbia	456,100	101,100	22	—
Florida	2,671,700	2,671,700	100	32
Georgia	1,445,000	1,445,000	100	45
Hawaii	309,600	309,600	100	—
Idaho	132,300	76,200	57	45
Illinois	2,493,200	2,193,200	88	—
Indiana	735,800	667,800	91	40-50
Iowa	377,000	226,200	60	90
Kansas	599,600	137,800	23	—
Kentucky	530,500	424,500	79	30
Louisiana	1,591,500	579,400	36	—
Maine	300,000	0	0	97
Maryland	1,050,900	563,200	54	70
Massachusetts	2,500,000	2,500,000	100	98
Michigan	939,900	939,900	100	74
Minnesota	232,500	157,500	68	70
Mississippi	350,000	26,000	7	50
Missouri	647,700	473,900	73	65
Montana	107,100	107,100	100	—
Nebraska	124,000	117,000	94	55
Nevada	102,800	102,800	100	40
New Hampshire	253,900	173,900	68	50
New Jersey	1,187,400	987,400	83	85
New Mexico	201,000	0	0	20
New York	4,123,500 *	3,575,600	88	74
North Carolina	529,800	459,300	87	85
North Dakota	212,900	54,200	25	90
Ohio	2,444,400	820,000	34	—
Oklahoma	600,000	360,000	60	50
Oregon	661,800	661,800	100	—
Pennsylvania	1,414,500	1,414,500	100	65
Puerto Rico	64,100	64,100	100	71
Rhode Island	186,700	186,700	100	—
South Carolina	695,900	629,600	90	80
South Dakota	125,000	70,500	56	60
Tennessee	590,000	165,000	28	—
Texas	4,277,700	4,277,700	100	—
Utah	325,000	325,000	100	55
Vermont	130,000	0	0	85
Virginia	874,500	615,900	70	—
Virgin Islands	11,300	0	0	—
Washington	643,300	643,300	100	68
West Virginia	750,000	0	0	75
Wisconsin	574,800	393,300	68	—
Wyoming	67,100	67,100	100	83
Total	47,307,900	36,404,800	77	

SOURCE: Survey of Criminal History Information System, 1992, Tables 1 and 2, p. 13 and 15.
NOTE: Dashes in last column indicate information is not available.
*The figure represents the number of subjects in the criminal history file; however, 28 percent of the database consists of civil purpose files.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018

Florida, Illinois, Virginia, and Wisconsin have implemented some type of point-of-sale firearm transactions program.

ELECTRONIC FEDERALISM

State criminal justice systems and the criminal history records supporting these systems have developed over time in a highly decentralized fashion. The result has been that each state's recordkeeping, which depends on myriad local court administrators and police departments, has evolved in a unique manner. The federal government is designing a national information infrastructure to bridge the vast differences in criminal recordkeeping among the states to allow for interstate communication.

To participate effectively in a national background-check system established under Brady, states would have to continue to improve their criminal history records, an unsung and often neglected workhorse of the criminal justice system. Moreover, access to a national system of data on individuals raises privacy and confidentiality issues. Careful consideration needs to be given to such issues as access limitations, dissemination controls, and system security. This challenge provides an opportunity for the federal government and criminal justice agencies across the nation to take advantage of the strengths of federalism in constructing a nationwide information network. A national information system for criminal history records would not only facilitate instant record checks of firearm purchasers but would also promote the effective and efficient dissemination and use of criminal history records throughout the criminal justice system.

CONCLUSION

Undoubtedly, the direct impact of Brady on handgun crime will be debated for some time by gun-control advocates and opponents. However, it may be widely acknowledged that a significant impact of Brady is the move to greater criminal history information-sharing among the states and the federal government. The successful establishment of a national information network based on state criminal-history records can point the way for other important locally generated databases that can be used nationally.[60] As the information age enters the twenty-first century, the states and the federal government will be under increasing pressure to devise better ways to fight crime. Under the federalist umbrella, this will require mutual recognition that both states and the federal government have key leadership roles to play in technological developments and program implementation.

[60]The National Child Protection Act of 1993, P.L. 103-209, requires state criminal justice agencies to report or index child-abuse information in FBI's criminal record system. The Family Support Act of 1988, P.L. 100-485, requires states to put in place by 1995 a statewide information system for child-support case handling and recordkeeping but does not require a national system.

Downloaded from https://academic.oup.com/publius/article-abstract/24/3/69/1871335
by Universite de Sherbrooke user
on 15 March 2018